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Supreme Court of the United States

OCTOBER TERM, 1957

No. 361

THE SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, VIRGINIA, R. O. NELSON, DIVISION SUPERINTENDENT OF SCHOOLS OF THE CITY OF NEWPORT NEWS, VIRGINIA, THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,
Petitioners,

v.

JEROME A. ATKINS, CAMILLE ATKINS, BRUCE ATKINS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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For the Norfolk School Authorities

For the Newport News School Authorities

Dated August 12, 1957.

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PETITION FOR A WRIT OF CERTIORARI

I.

INTRODUCTION

The School Board of the City of Newport News, Virginia, R. O. Nelson, Division Superintendent of Schools of the City of Newport News, the School Board of the City of Norfolk, Virginia, and J. J. Brewbaker, Division Superintendent of Schools of the City of Norfolk, hereby petition that a writ of certiorari issue to review decrees of the United States Court of Appeals for the Fourth Circuit entered July 13, 1957. Those decrees affirmed the orders entered by the United States District Court for the Eastern District of Virginia on February 26, 1957, enjoining the Petitioners from regulating or affecting, on the basis of race or color, the admission, enrollment or education of Negroes in the public schools of Newport News and Norfolk, Virginia.

This is a Petition filed in two cases in accordance with the permission contained in Section 5 of Rule 23 of the Revised Rules of this Court.

II.

OPINIONS BELOW

The opinion of the District Court in both cases (N.N.A. 11; N.A. 12[1]) holding the Virginia statute referred to below in violation of the Constitution of the United States, a holding that we conceive to be in error, is reported at 148 F. Supp. 430. The final opinion of the District Court in the

[1] N.N.A. refers to the Appendix to the Brief for the Appellants in the Fourth Circuit in the Newport News case; N.A. refers to the similar Appendix in the Norfolk case.

Newport News case, delivered from the bench (N.N.A. 93), is unreported; a memorandum delivered in the Norfolk case (N.A. 102) is similarly unreported.

The *per curiam* opinion of the Court of Appeals in both cases, reprinted in Appendix A, has not yet been reported.

III.

JURISDICTION

The opinion of the Court of Appeals is dated July 13, 1957. On July 15, 1957, the Court of Appeals stayed issuance of its mandate and the orders of the District Court on the condition that this Petition be filed on or before August 14, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV.

QUESTIONS PRESENTED

The questions presented are four:

1. Was not the Court of Appeals in error in affirming an order holding a Virginia statute unconstitutional at a time when a proceeding to test its constitutionality, previously untried, was pending in the Supreme Court of Appeals of Virginia?

2. Should not the Court of Appeals have reversed the order appealed from which, by the action of a single judge, declared a Virginia statute unconstitutional and, in essence, enjoined its enforcement in Norfolk and Newport News in disregard of the statutory requirement that such an order be entered only by a court of three judges?

3. Was not the Court of Appeals in error in affirming a determination by the District Court that a Virginia stat-

ute was unconstitutional on its face and in the abstract in advance of any action or administration pursuant to the statute?

4. Was not the Court of Appeals in error in refusing to reverse the orders of the District Court requiring immediate integration of the public schools in the two Virginia cities on the ground that the orders constituted clear abuse of judicial discretion in the light of the evidence of record?

The Petitioners urge that these questions, each vital to the continuance of public education in Virginia, should all be answered in the affirmative.

V.

STATUTE INVOLVED

The statute at issue is Chapter 70 of the Acts of Assembly of Virginia, Extra Session 1956. It is reprinted in Appendix B. It and other statutes contemporaneously adopted in regard to Virginia's public schools are printed in an official pamphlet, copies of which have been delivered to the Clerk of this Court. This pamphlet of Virginia statutes is cited herein as V. .....

VI.

STATEMENT OF THE CASE

These are the familiar school segregation cases, but they involve much more than simple reargument of matters previously decided by this Court.

The Respondents are numerous Negro children or their parents or guardians residing in Newport News and Norfolk. The Petitioners are the School Boards and the Division Superintendents of Schools in the two cities. The Respondents asserted that the schools in the two cities are

segregated by race; they sought an injunction against their continued operation on this basis. The Petitioners admitted that such segregation was still enforced but denied injury to the Respondents.

Thereafter, as authorized by the District Court, the Petitioners moved to dismiss these cases on new grounds. The General Assembly of Virginia adopted a comprehensive revision of the school laws. Among the statutes that it enacted was Chapter 70. It removed all power as to the assignment of pupils from the Petitioners and conferred it on a Pupil Placement Board. That Board was authorized to act on stated bases, none in any way involving race or color. The Petitioners, on the basis of well recognized principles, sought to require the Respondents to seek their administrative remedies there before coming to a Federal Court.

The District Court heard argument and received briefs. It then took the bold step of declaring Chapter 70 "unconstitutional on its face" (N.N.A. 70), even though it had barely become effective and the Board had neither determined its procedure nor received applications for assignment to schools.

The cases then moved to trial. In each case, the Respondents showed merely that segregated schools remained in operation without plans for their amalgamation. Testimony for the Petitioners was more extensive. In the Newport News case, the Superintendent testified that integration would wreck the schools, would cause intolerable difficulties because of marked differences in scholastic attainment and would sharply increase disciplinary problems (N.N.A. 48-65). His views were supported in detail by the Chairman of the School Board, the Chief of Police, the Mayor and the City Manager. Statistical material supporting these conclusions was presented in detail (N.N.A. 100-124). Similar evidence was presented in the Norfolk case.

The District Court decided each case from the bench. In one, it suggested that school district lines be gerrymandered (N.N.A. 98-9). It concluded by ordering substantially immediate desegregation. Decrees were promptly entered to that end and they are the decrees appealed from here (N.N.A. 41-2; N.A. 108-9).

Appeals were promptly perfected to the Court of Appeals for the Fourth Circuit. In the interim before argument, a proceeding arising from a different part of the State was independently instituted before the Supreme Court of Appeals of Virginia to test the validity of Chapter 70. That proceeding, under the style of *Theodore Thomas DeFebio* v. *County School Board of Fairfax County, Virginia*, is presently before that court awaiting determination this fall.[2] The pendency of that proceeding was properly brought to the attention of the Court of Appeals.

That court received briefs and heard argument and rendered a brief *per curiam* decision. The first two questions raised by Petitioners here were dismissed with the formal comment that no injunction was sought in the District Court against enforcement of Chapter 70. As to the constitutionality of that statute, the opinion reached no clear cut answer; it merely stated that the statute "affords no adequate remedy" to Respondents. The result, of course, is in essence the same for the Respondents are given *carte blanche* to disregard a statute by which, if it were effective, they would be bound. On the question of judicial discretion the Court of Appeals contented itself with quotations from other opinions. In result, the orders appealed from were affirmed.

The Petitioners moved promptly to bring these cases to this Court. The Court of Appeals, on motion of the Peti-

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[2] Excerpts from the record in that case are reprinted in Appendix C. The constitutional issue is clearly raised in respect of both the State and Federal constitutions.

tioners, has stayed the effectiveness of the orders appealed from until final action here.

VII.

THE REASONS FOR ALLOWANCE OF THE WRIT

1.

Deference to State Action

Chapter 70 is a Virginia statute recently enacted. There is pending a proceeding in Virginia's highest court in which the constitutionality of that statute is challenged. That proceeding will lead to a determination certainly within four months. The Court of Appeals was asked to stay its hand pending that determination. It refused to do so. Its action was in exact contravention of decisions of this Court.

As recently as May 13, 1957, this Court said:

> "In an action brought to restrain the enforcement of a state statute on constitutional grounds, the federal court should retain jurisdiction until a definitive determination of local law questions is obtained from the local courts." *Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U. S. ....., 1 L. ed. 2d 894, 896 (1957).

The same position has been taken by this Court in many other recent cases, notably *Shipman* v. *DuPre*, 339 U. S. 321 (1950), and *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946).

The Court of Appeals squarely disregarded the rule so established by this Court. Its attempt at avoidance is merely formal. Its rationale was that

". . . no injunction was asked or granted against the enforcement of the act or the officials charged with its enforcement. . . ."

But we suggest that this is an escape into mere technicality. When the suit was instituted in the District Court, Chapter 70 had not been enacted; the General Assembly was not even in session. By a procedural order entered July 9, 1956 (not reprinted in the Appendices for no one thought it of any real importance until this technicality arose), the District Court authorized any party to amend his pleadings in the light of legislation to be enacted by the General Assembly, for the special session was then in prospect. The Petitioners raised, within the time permitted by the District Court, the existence of Chapter 70 as a complete bar to the relief sought by the Respondents (N.N/A. 10-11; N.A. 12). The District Court held explicitly that it was not a bar because it was unconstitutional and could be disregarded. No effort has, for this reason alone, ever been made to enforce it in Newport News or Norfolk, although it is effective almost everywhere else throughout Virginia. The Petitioners have looked on the District Court's determination as an injunction, as has everyone else including the Pupil Placement Board, and the effect has been that of an injunction, peremptory in nature, within these localities.

The reason advanced by the Court of Appeals here is mere foam on the ocean's surface. Rules of law established by this Court should not be permitted to disappear without some element of substantial reason for their disappearance. The interrelation of State and national sovereignty, often difficult to administer in matters of little import, requires careful preservation when the issue is, as here, one of vital importance to the locality.

The reestablishment by this Court of a rule so recently

reiterated by it and so easily dismissed by the Court of Appeals provides ample reason for review of this case by this Court.

2.

The Three-Judge Court

The Petitioners sought a three-judge court for the determination of the constitutionality of Chapter 70 and its enforceability in Newport News and Norfolk. The District Court denied this request and, in effect, enjoined its enforcement (N.N.A. 39-41; N.A. 40-42). The issue was raised again in the Court of Appeals. That court thought three judges unnecessary.

A three-judge District Court is required whenever a preliminary or permanent injunction is sought against the operation of a State statute on the ground that it is offensive to the Constitution of the United States. 28 U.S.C. §2281. The reason for this is entirely applicable here; it is to prevent a single judge from creating the havoc that results from the overthrow of a State statute. *Phillips* v. *United States*, 312 U. S. 246 (1941).

The Court of Appeals held a three-judge court unnecessary because no injunction was sought in the District Court. That conclusion is, as we have urged above, purely technical and unrealistic. It supported its view by citation of *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, 337 (E. D. La. 1956), *mandamus denied*, 351 U. S. 948 (1956), District Court affirmed, 242 F. 2d 156 (5th Cir. 1957), *cert. denied*, ... U. S. ....., 1 L. ed. 2d 1436 (1957). But that case provides no support for this decision. In that case, the three-judge court decided the constitutional issue and thereafter returned the case to a single judge; if that is not clear from the opinions, it is clear from the brief in opposition in the mandamus proceeding where it was said:

". . . the procedure adopted by the statutory District Court in the instant case was a logical and proper one: to determine whether the challenged statutes were within the scope of the decision in the *Brown* case and, upon reaching a determination that said statutes 'are invalid under the ruling of the Supreme Court in Brown', to then remand the case to a single judge to enforce the remedial provisions of the *Brown* case." (p. 7)

That is precisely what was *not* done in this case.

The policy established by the Congress is that a single District Judge shall not prevent the enforcement of a State statute; that is exactly what has been done in Newport News and Norfolk in these cases. It is important that this Court clarify the situations where three judges are required to overthrow State action; if these be not such cases, the three-judge court may well disappear.

3.

The Constitutionality of Chapter 70

In its recent decision in *Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U. S. ....., 1 L. Ed. 2d 894, 896 (1957), this Court said:

"Federal courts will not pass upon constitutional contentions presented in an abstract rather than in a concrete form."

Both Courts below dealt in these cases with the constitutionality of Chapter 70 entirely in the abstract.

The District Court held that Chapter 70 was "unconstitutional on its face" just two weeks after its effective date. At that time no substantial action had been taken pursuant to the statute. No one had any conception of how it would

ernor making the appointment. Members of the Board shall receive as compensation for their services a per diem of twenty dollars for each day actually spent in the performance of their duties and shall be entitled to reimbursement for their necessary expenses incurred in connection therewith.

§ 2. The Pupil Placement Board may designate, appoint and employ such agents as it may deem desirable and necessary in the administration of this act. It may authorize such agents to hold the hearings hereinafter provided for and take testimony and submit recommendations in any and all cases referred to them by said Board.

§ 2a. For the conduct of such hearings and to facilitate the performance of the duties imposed upon it and its agents under this act, the Pupil Placement Board is authorized to promulgate all such rules and regulations and procedures and prescribe such uniform forms as it deems appropriate and needful and to require strict compliance with the same by all persons concerned.

§ 3. The Pupil Placement Board in enrolling each pupil in a school in each school district shall take into consideration:

(1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the efficiency of the operation of said school.

(2) The health of the child as compared to other children in the school.

(3) The effect of any disparity between the physical and mental ages of any child to be enrolled especially when contrasted with the average physical and mental ages of the group with which the child might be placed.

(4) Availability of facilities.

(5) The aptitude of the child.

(6) Availability of transportation.

(7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils.

(8) Such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

§ 4. After the effective date of this act, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled, for good cause shown, in a different school by the Pupil Placement Board.

§ 5. Any child who desires to enter a public school for the first time following the effective date of this act, and any child who is graduated from one school to another within a school division or who transfers to a school division, or any child who desires to enter a public school after the opening of the session, shall apply to the Pupil Placement Board for enrollment in such form as it may prescribe, and shall be enrolled in such school as the Board deems proper under the provisions of this act. Such application shall be made on behalf of the child by his parent, guardian or other person having custody of the child.

§ 6. Both parents, if living, or the parent or guardian of a pupil in any school in which a child is enrolled by action

of the Pupil Placement Board, if aggrieved by an action of the Board, may file with the Board a protest in writing within fifteen days after the placement of such pupil. Upon receipt of such protest the Board shall hold or cause to be held a hearing, within not more than thirty days, to consider the protest and at the hearing shall receive the testimony of witnesses and exhibits filed by such parents, guardians or other persons, and shall hear such other testimony and consider such other exhibits as the Board shall deem proper. The Board shall consider and decide each individual case separately on its merits. The Board shall publish a notice once a week for two successive weeks in a newspaper of general circulation in the city or county wherein the aggrieved party or parties reside. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter and the time and place of the hearing. The Board shall, within not more than thirty days after the hearing, file in writing its decision, enrolling such pupil in the school originally designated or in such other school as it shall deem proper. The written decision of the Board shall set forth the findings upon which the decision is based. Any parent, guardian or other person having custody of any child in the particular school in which a child is enrolled by action of the Board shall be deemed an interested party and shall have the right to intervene in such proceeding in furtherance of his interest.

§ 6a. Any party aggrieved by a decision of the Pupil Placement Board under this act, or any party defined as an interested party in § 6 may obtain a review of such decision by filing an application in writing for a review thereof with the Governor within fifteen days after such decision. Such application shall be by a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the

Pupil Placement Board, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Pupil Placement Board and a transcript of the proceedings before the Pupil Placement Board, which shall be furnished to the petitioner by the Pupil Placement Board within ten days after request therefor upon payment of the costs of such transcript by the petitioner. Upon the filing of a petition for a review with the Governor, the Governor shall set the same for a hearing and within fifteen days after the petition has been filed with him, he shall file in writing, his decision, enrolling such pupil in the school originally designated or in such other school as he shall deem proper. The written decisions of the Governor shall set forth the findings upon which his decision is based.

§ 7. Any party aggrieved by a decision of the Governor under this act or any party defined as an interested party in §6 may obtain a review of such decision by filing in the clerk's office of the circuit court of the county or corporation court of the city in the jurisdiction of which such party resides, within fifteen days after such decision, a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Governor, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Governor and a transcript of the proceedings before the Governor, which shall be furnished to the petitioner by the Governor within ten days after request therefor upon payment of the costs of such transcript by the petitioner.

§ 7a. Any interested party, as defined in §6 may, by petition, intervene for the purpose of making known and

supporting his interest, in any proceeding for review of the Pupil Placement Board's decision instituted by an aggrieved party or by another interested party; and the court having jurisdiction of such review proceedings shall hear the evidence of as many interested parties, as defined in § 6, in any such review proceeding, as in its discretion it may deem proper, whether or not such interested parties shall have petitioned for such review or petitioned to intervene therein.

§ 8. Upon the filing of the petition the clerk of the court shall forthwith notify the Pupil Placement Board, requiring it to answer the statements contained in the application within twenty-one days, but failure to do so shall not be taken as an admission of the truth of the facts and allegations set forth therein. The clerk of the court shall publish a notice of the filing of such application once a week for two successive weeks in a newspaper of general circulation in the county or city for which the court sits and shall, in addition, post the same at the door of the courthouse. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter, and shall set forth the time and place for the hearing. The proceedings shall be matured for hearing upon expiration of twenty-one days from the issuance of the notice to the Pupil Placement Board by the clerk of the court and heard and determined by the judge of such court, either in term or vacation.

§ 9. The findings of fact of the Pupil Placement Board shall be considered final, if supported by substantial evidence on the record.

§ 10. From the final order of the court an appeal may be taken by the aggrieved party or any interested party as defined in § 6, to the Supreme Court of Appeals as an appeal

of right, in the same manner as appeals of right are taken from the State Corporation Commission.

§ 10a. An injunction proceeding may be brought in any State court of competent jurisdiction by the Commonwealth, or by any interested party as defined in § 6, for the purpose of restraining the performance of any act, or any intended or threatened act, which may be in evasion of, in disregard of, or at variance with, any of the foregoing provisions.

§ 11. Neither the Pupil Placement Board nor its agents shall be answerable to a charge of libel, slander or insulting words, whether criminal or civil, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statement made during the proceedings or deliberations.

[The effective date of this statute was December 29, 1956.]

APPENDIX C

Excerpts from Record in DeFebio v. County School Board of Fairfax County, Virginia

1.

Excerpt from Petition for Writ of Mandamus

* * *

"18. That the plaintiffs have been advised by counsel and therefore aver that such suspension, expulsion and dropping of infant plaintiffs from said public schools by the defendants, The County School Board of Fairfax County, The Division Superintendent of Schools and by the principals of said respective schools, and the said refusal of permission by all and each of the defendants are arbitrary, capricious, unlawful and void actions in that:

"(a) Such action unlawfully deprives the infant plaintiffs of the right to attend, and of the plaintiff, Theo T. DeFebio, of the right to have the infant plaintiffs attend, public schools of Fairfax County, which rights are guaranteed by law.

"(b) Such action forces plaintiff infants to violate the Virginia Compulsory School Attendance Law, to wit: 22-251 et seq., Code of Virginia, 1950, as amended.

"(c) Such action purported to have been taken by direction of the said Pupil Placement Board of the Commonwealth of Virginia, is in violation of Sections 130 to 133 inclusive of the Constitution of the Commonwealth of Virginia, in that the authority conferred by the Constitution of the Commonwealth of Virginia for general supervision of the aforesaid public schools is granted to and vested in solely the State Board of Education and that local supervision of the aforesaid public schools under the Constitution of the Commonwealth of Virginia is granted to and vested in solely the County School Board of Fairfax County, and

not in the Pupil Placement Board of the Commonwealth of Virginia or in any other state agency or official.

"(d) The Pupil Placement Act, to wit: 22-231.1 et seq., Code of Virginia, 1950, as amended, under which infant plaintiffs are being denied the right to a public school education, and under which the plaintiff, Theo T. DeFebio, is being denied the right to have said infant plaintiffs receive a public school education, is invalid under Sections 130 to 133 inclusive of the Constitution of the Commonwealth of Virginia, in that the authority conferred by the Constitution of the Commonwealth of Virginia for general supervision of the aforesaid public schools is granted to and vested in solely the State Board of Education, and that local supervision of the aforesaid public schools under the Constitution of the Commonwealth of Virginia is granted to and vested in solely the County School Board of Fairfax County and not in the Pupil Placement Board of the Commonwealth of Virginia or in any other state agency or official.

"(e) The Pupil Placement Act, to wit: 22-231.1 et seq., Code of Virginia, 1950, as amended, is invalid on its face under the Fourteenth Amendment of the Constitution of the United States and that the application of the said Pupil Placement Act in this case deprives plaintiffs of liberty and property without due process of law and of equal protection of law."

* * *

2.

Excerpt from Answer to Petition for Writ of Mandamus

* * *

"7. The allegations of Paragraph 18 of the petition are denied."

* * *

3.

Order Entered by Supreme Court of Appeals of Virginia on June 10, 1957

* * *

"This day came Theodore Thomas DeFebio and Dominick Nicholas DeFebio, infants under the age of twenty-one years, who sue by Theo T. DeFebio, their mother and next friend, and Theo T. DeFebio, individually and in her own right, by counsel, and presented to the Court their petition praying that a writ of mandamus do forthwith issue, directed to The County School Board of Fairfax County, W. T. Woodson, Division Superintendent, Melvin B. Landes, Principal of the Mount Vernon High School, Elsie Fletcher, Principal of the Hollin Hall Elementary School, William N. Neff, President of the State Board of Education, Garland Gray, Member of the State Board of Education, Robert Button, Member of the State Board of Education, Leonard G. Muse, Member of the State Board of Education, Mrs. Gladys V. Morton, Member of the State Board of Education, Thomas C. Boushall, Member of the State Board of Education, Mrs. John Galleher, Member of the State Board of Education, and Davis Y. Paschall, Superintendent of Public Instruction, requiring and compelling them to reinstate forthwith the said infant petitioners in the appropriate public schools of Fairfax County, Virginia.

"And it appearing to the Court that copies of the notice of application and of said petition have been duly served on the respondents, it is ordered that this cause be docketed.

"Also came the respondents, by counsel, and on motion leave is granted to file a demurrer, answer or other appropriate pleadings on or before June 20, 1957, and to file evidence on the issues raised on or before July 10, 1957. It is further ordered that the record be printed; that the petitioners file

with the clerk 25 printed copies of their brief on or before August 9, 1957; that the respondents file with the clerk 25 printed copies of their brief on or before September 1, 1957; that the petitioners file with the clerk 25 printed copies of their reply brief on or before September 10, 1957; and this cause is continued."

APP.

C